No. 89-1332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GENE MCNARY, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

Petitioners,

—v.—

HAITIAN REFUGEE CENTER, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

Counsel:

ROBERT E. JUCEAM, ESQ.
WILLIAM MCGUINNESS, ESQ.
SANDRA M. LIPSMAN, ESQ.
CRAIG H. BAAB, ESQ.
CAROL L. WOLCHOK, ESQ.

Counsel of Record:

JOHN J. CURTIN, JR. ESQ.
President, American Bar Association
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Miscellaneous:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1332

GENE MCNARY, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

Petitioners,

—v.—

HAITIAN REFUGEE CENTER, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

The American Bar Association ("ABA") is a voluntary national membership organization of the legal profession. Its over 360,000 members come from every state and territory and the District of Columbia. The ABA's constituency includes prosecutors, public defenders, attorneys in private practice, trial and appellate judges at the state and federal levels, legislators, law professors, law enforcement and corrections personnel, law students, and a number of non-lawyer "associates" in allied fields.

The ABA also has an historic interest in immigration policy issues and in the fair enforcement and implementation of our nation's immigration and refugee laws. Consistent with these principles and to help implement them, the ABA's policymaking House of Delegates created in 1983 the Coordinating Committee on Immigration Law. This committee, made up of representatives of nine ABA entities with specialized expertise (e.g., administrative law), has assisted in organizing numerous *pro bono* immigration representation efforts and trained volunteer attorneys from the private bar to counsel legalization applicants and represent them on appeal.

The ABA has an active and direct interest in the efficient and equitable administration of justice. The ABA appears as *amicus curiae* in the case because the question presented has serious implications for the allocation of the resources of the federal judiciary and access of parties to an effective forum for judicial review of administrative agency action. The ABA has received the consents of all parties to this case.

SUMMARY OF ARGUMENT

As part of the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359, Congress required the Attorney General to grant residency under a Special Agricultural Worker ("SAW") program to alien farm workers who performed seasonal agricultural services and who otherwise qualified under the Immigration and Nationality Act, 8 U.S.C. § 1160 *et seq*. On this appeal the government erroneously contends that federal district courts are wholly precluded from asserting federal question or general immigration jurisdiction over matters arising under Title II of the Immigration and Nationality Act, 8 U.S.C. § 1329, by 8 U.S.C. § 1160(e) ("Section 1160(e)") where organizational as well as individual plaintiffs challenge the constitutionality of INS practices and policies that make meaningful individual review impossible.

The government's interpretation of Section 1160(e) would have the impermissible effect of precluding a forum for resolution of constitutional claims. The agency does not purport to adjudicate constitutional issues. Further, the statute and regulations circumscribing the administrative record that may be made and thus reviewed in the context of a SAW applications procedure and administrative appeal do not permit an applicant, as a practical matter, to make a factual record of alleged system-wide due process violations or of the factors to be considered in assessing the constitutionality of agency action. Clearly, a deficient record cannot be cured in a court of appeals. Thus, access to the factfinding forum of a district court is essential to the prosecution of broad-based "pattern and practice" regulatory challenges to the SAW process.

Moreover, the plain language and legislative history of the statute demonstrate that Section 1160(e) was intended to apply only to individual appeals of a "determination" on a SAW application and not to claims asserting system-wide defects in the process by which that determination was made. Single-tier judicial review provisions, of the kind the petitioners envisage, that vest jurisdiction in a court of appeals are traditionally viewed as a means of achieving efficiency by eliminating a layer of review in cases where the trial court would do little more than duplicate either the agency factfinding or the judicial appellate function. Below, as traditionally in pattern and practice cases, the role of a district court is not duplicative—it is essential for development of an adequate factual record.

The government's interpretation of Section 1160(e) would also have the effect of requiring SAW applicants to assert claims on a case-by-case basis that, insofar as they raise agency-wide practice and policy issues, would far more efficiently be dealt with as class actions. As argued under Point II, the government's own statistics demonstrate the burdens on the judiciary that would result unmitigated by any benefits to the parties and do not warrant judicial legislation to read into a statute that which is neither express nor intended.

ARGUMENT

POINT I

THE GOVERNMENT'S INTERPRETATION OF SECTION 1160(e) WOULD HAVE THE IMPERMISSIBLE EFFECT OF PRECLUDING REVIEW OF UNCONSTITUTIONAL AGENCY CONDUCT

It is entirely beyond the power of a SAW applicant to mount a broad-based challenge to regulatory procedures within the confines of Section 1160(e).[1] Administrative appel-

1 We respectfully refer the Court to the Petitioners' Appendix ("Pet. App."), the Response to the Petition for Certiorari, and the briefs of the parties for the full text of Section 1160(e) and other relevant statutory provisions, and for detailed statements of the background of this case.

We note briefly here that section 1160(e) relates to "administrative or judicial review of a determination respecting an application for adjustment of status under [the SAW program]." § 1160(e)(1).

The administrative procedure resulting in this "determination" commences with a personal interview at a legalization office ("LO"), a local office of the Immigration and Naturalization Service ("INS") authorized to accept and process applications. 8 C.F.R. § 210.1(i). The interviewing officer at the LO may deny the application, recommend that it be denied, or recommend that it be granted. Pet. App. 22a. Those applications that are not denied by the LO are forwarded to a regional processing facility ("RPF") for adjudication. *Id.*

The statute requires the Attorney General to "establish an appellate authority to provide a single level of administrative review of such a determination." § 1160(c)(2)(A). The appellate authority established under this section is the Legalization Appeals Unit ("LAU"). Pet. App. 22a.

Judicial review of a decision of the LAU is set forth in § 1160(e)(3)(A), which provides that "there shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation under section 1105 of this title." Section 1105a provides in relevant part that "venue of any petition under this section shall be in the judicial circuit in which the administration proceedings . . . were conducted . . ." 8 U.S.C. § 1105a(a)(2). The circuit court's review is required to "be based solely upon the administrative record established at the time of the review by the appellate authority. . . ." § 1160(e)(3)(B).

late review is limited under the statute to "the administrative record established at the time of the determination on the application and . . . such additional or newly discovered evidence as may not have been available at the time of the determination." Section 1160(e)(2)(B). This "record" consists solely of a completed application form, a report of medical examination, any evidence by way of documents or affidavits of qualifying agricultural employment and residence, and notes, if any, taken on a Form I-696 worksheet by an interviewer at an LO at the time of an initial application—all relating in any given case to a single SAW applicant. *See* 8 C.F.R. §§ 210.1(c), 210.3(c)(3), 201.1(h); Pet. App. 4a, 28a.

The record established at the time of determination of an application is thus a wholly inadequate basis for review of system-wide practices and procedures like those alleged in this case.[2] That record does not begin to address the factors to be considered in assessing the constitutionality of agency procedures—the private interest at stake, the risk of erroneous deprivation and the probable value of additional safeguards, and the fiscal and administrative burdens that additional procedures would entail. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (*Mathews* test appropriate for evaluation of procedures in immigration context.) These factual determinations rest on evidence that is beyond the scope of an individual

2 It is not contested on this appeal that the INS systematically deprived thousands of SAW applicants of procedural safeguards designed to ensure a reasonable opportunity to obtain the benefits of the SAW program and to provide a record for review of any denial of these benefits. As is set forth more fully in Respondents' Brief, SAW applicants were subjected to an impermissible burden of proof; they were denied the opportunity to hear and rebut adverse evidence; they were denied translators necessary to adequate presentation of evidence; and they were deprived of an accurate record—in many cases, any record at all—of such evidence as they were able to present. *See* Respondents' Brief ("Resp. Br.") at 7-9.

SAW application and largely within the exclusive control of the government.[3]

A deficient factual record cannot be remedied in the court of appeals. *Congress & Empire Spring Co. v. Knowlton*, 103 U.S. 49 (1880); *Hefner v. New Orleans Pub. Serv., Inc.*, 605 F.2d 893 (5th Cir. 1979), *cert. denied*, 445 U.S. 955 (1980); 4A C.J.S. *Appeal and Error* § 1206 (1957). Even if a court of appeals were inclined to seek a means of supplementing the record before it, Section 1160(e)(3)(B) explicitly limits circuit court review to "the administrative record established at the time of review by the appellate authority. . . ." Expansion of Section 1160(e) to encompass all claims relating to SAW procedures, as the government urges on this appeal, would thus deprive SAW applicants of any forum for the factfinding essential to resolution of broad-based regulatory challenges.

Nothing in the language of the statute warrants a result so completely at odds with this Court's "strong presumption that Congress intends judicial review of administrative action," *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986), a presumption that applies with particular force in the presence of "the 'serious constitutional question' that would arise if a federal statute were to deny

3 In the present case, for example, it was only in the district court that respondents were able to adduce sworn INS testimony revealing, among other things, that the INS does not investigate the proficiency of interpreters (Pet. App. 27a); that INS officers did not receive any training or instruction as to the shifting burden of proof to be employed in SAW cases and held erroneous views as to the standard required (Pet. App. 31a); and that the INS maintained lists of "suspect" affiants and relied on these lists to determine that an application was fraudulent without giving the applicant or the affiant any opportunity to rebut the "suspected" fraud (Pet. App. 32a-33a). Nor could a SAW applicant introduce into an administrative record regarding an individual application statistical evidence of the language capabilities of all SAW applicants (Pet. App. 26a); system-wide application of specific INS policies and practices (Pet. App. 9a, 28a, 32a-36a), or statistical evidence of relevant practices of farm labor contractors and other agricultural employees (Pet. App. 28a-29a).

any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988).[4]

To the contrary, the plain language of Section 1160(e) places the statute squarely within the class of jurisdiction-preclusion provisions that are traditionally viewed as warranted only in circumstances where district court factfinding would unnecessarily duplicate an adequate administrative record—circumstances that are not present in "pattern and practice" cases where district court factfinding is essential. The statute on its face applies only to an individual applicant's appeal of a denial of SAW status and presumes the existence of a factual record from which an appellate tribunal can determine whether that denial was in error. Section 1160(e) speaks at all relevant points to "a *determination* restricting an application for adjustment of status," § 1160(e)(1); "review of *such a determination*," § 1160(e)(2)-(B); "the administrative record established at the time of *the determination*" § 1160(e)(2)(B); and "review of *such a denial*," § 1160(e)(3)(A) (emphasis added).

The United States Code is replete with similar provisions, all of which have in common the definition of a specific agency order based on a record that it would be wasteful to duplicate in a district court.[5] The traditional rationales for this kind of restriction on judicial review are conservation of

4 *See also Johnson v. Robison*, 415 U.S. 361, 367-73 (1974); *Weinberger v. Salfi*, 422 U.S. 749 (1975); *Oesterich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 237-38 (1968); *Harmon v. Brucher*, 355 U.S. 579, 581-82 (1958); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 52 (1955); *Estep v. United States*, 327 U.S. 114, 120-23 (1946); *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329, 334-37 (1932).

5 A partial illustrative list is provided in 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure: Jurisdiction* § 3941 (1977), which cites approximately 60 such provisions, ranging from orders of the Administrator of the Environmental Protection Agency with respect to the registration of poisons and pesticides, 7 U.S.C. §§ 135b(d), 136n(4), to actions of the United States Commissioner of Education in acting on state plans for community services program grants, 20 U.S.C. § 1008.

judicial resources and efficiency of administrative process. Vesting jurisdiction to review agency orders in the court of appeals under these statutes is simply a means of eliminating one layer of review in situations where a trial court would do little more than duplicate either the agency factfinding or judicial appellate function:

> [A]dministrative agencies, particularly in discharging quasi-judicial adjudicating functions, perform much the same functions with respect to the courts of appeals as do district courts. Evidence is heard, a record is prepared and sifted, issues are identified and resolved. Frequently, indeed, the issues are subject to the further testing of intra-agency review on appeal from an administrative law judge or hearing examiner, and resolution by a collegial body. The questions open for judicial review are commonly questions of law or review of the record for substantial evidence to support the administrative decision—matters as to which a district court would play the same role as a court of appeals. Review initially by a district court, and then by a court of appeals, would impose added burdens of delay on the administrative process, and of delay and expense on the parties.

16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure: Jurisdiction* § 3940, at 302 (1977).

The burdens imposed by two-tier judicial review of administrative determinations—as distinguished from two-tier review of challenges to the process by which such determinations are made—are described in *Polcover v. Secretary of the Treasury*, 477 F.2d 1223 (D.C. Cir.), *cert. denied*, 414 U.S. 1001 (1973). There, district court review of a claim of wrongful discharge of a federal employee was limited to the record made by the Civil Service Commission, and the district court was required to apply the same standards of review as the court of appeals. The court of appeals criticized the

> [d]uplication, delay, expense and despair for the employee-litigant [that] are inherent in such a system.

> The interposition of the district court serves . . . no viable purpose [where] the record before us is identical to that [which had already been made at the administrative level and presented to] the district court.

477 F.2d at 1227.

Such would be the response were respondents here simply seeking to arrogate to the district court the narrow role ascribed to the court of appeals in Section 1160(e). At issue on this appeal, however, is an entirely different claim: that a district court has jurisdiction to entertain challenges to the process by which SAW determinations are made, a species of claim as to which no record could be made effectively in the absence of two-tier judicial review.

This Court has consistently recognized the distinction, for the purpose of jurisdiction preclusion, between appeals from a documented administrative decision and challenges to the process by which the determination is made. *See Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 675 (1986) (statute that limits review of "any determination . . . of . . . the amount of benefits . . . simply does not speak to challenges mounted against the *method* by which such amounts are to be determined rather than *determinations* themselves"); *Christian v. New York State Dep't of Labor*, 414 U.S. 614, 622 (1974) ("the fact that the . . . agency's decision is not statutorily subject to judicial review does not preclude review of the agency's procedure used to reach that determination"); *see also Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471 (1977); *Fusari v. Steinberg*, 419 U.S. 379 (1975); *California Dep't of Human Resources v. Java*, 402 U.S. 121 (1971).

The rationale for single-tier judicial review is obviously irrelevant to the case where, as here, the very essence of claim sought to be heard in the district court is that the agency has precluded any meaningful review of its decisions. Thus, the two-tier judicial review of system-wide agency practices does not, as the government argues on this appeal, lead to a "peculiar division" of jurisdiction wherein the court of

appeals reviews "less important" issues than the district court.[6] A court of appeals, like the Eleventh Circuit below and the D.C. Circuit in *Ayuda*, would never have the opportunity to pass upon "broad questions . . . relating to a whole class of aliens" in the absence of a district court forum for development of the facts underlying those questions. More to the point, absent resolution of these "broad questions" by way of federal judicial trial and appeal, there cannot arise an "individual case" for the Court of Appeals to review as intended under Section 1160(e). As the Court of Appeals below correctly observed, "[w]ithout any record of what transpired at the interview . . . the review provided for in IRCA is meaningless. 'Meaningful review requires that the reviewing court should review'." Pet. App. 16a (quoting *Kent v. United States*, 383 U.S. 541, 561 (1966)).

POINT II

DIVESTING DISTRICT COURTS OF FEDERAL QUESTION JURISDICTION OVER "PATTERN AND PRACTICE" CLAIMS DEPRIVES THE PARTIES AND THE JUDICIARY OF THE EFFICIENCIES OF CLASS ACTION LITIGATION

The government's interpretation of Section 1160(e) would preclude SAW applicants from proceeding as a class under Fed. R. Civ. P. 23 ("Rule 23"). The government's position would thus require all SAW applicants who may allege injury from system-wide agency abuses to seek relief on a case-by-case basis and an incurably defective record in the federal

6 *See* Petitioners' Brief ("Pet. Br.") at 14: "In this case, permitting review of an alleged pattern and practice of INS conduct in district court would lead to a 'rather peculiar' division of jurisdiction, because the court of appeals, in reviewing deportation orders, would hear 'only the application of the statute in presumably less important individual cases' while district courts would review 'the much more important cases involving broad questions . . . that would apply to a whole class of aliens' " (quoting *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325, 1331-32 (D.C. Cir. 1989)).

appellate courts in the context of individual deportation orders. A sense of the overwhelming burden this would impose on the parties and courts is provided by the INS' own statistics.

According to INS statistics, half of the nearly 1.3 million SAW applications on file were still pending as of May 16, 1990. Statistics Division, Office of Plans and Analysis, U.S. Immigration and Naturalization Service, *Provisional Legalization Application Statistics*, Table 1, May 16, 1990. Of the approximately 50,000 applicants whose petitions had been denied as of that date, *id.*, "about fifteen percent . . . have filed appeals with the LAU." 2 C. Gordon & S. Mailman, *Immigration Law and Procedure* § 47.02(8)(c), at 47-36 (rev. ed. 1990) (citing telephone interview with Michael Jaromin, INS Legalization Office (Oct. 12, 1989)). According to the government's Petition for a Writ of Certiorari in this case, "nearly 30 . . . cases have been filed across the country to challenge INS rules and policies under the legalization programs." Cert. Pet. at 28.

INS statistics show that during the period 1982 through 1988, federal circuit courts managed to review an average of 387 orders of deportation per year, leaving an average of 830 cases pending at each year-end. *1988 Statistical Yearbook of the Immigration and Naturalization Service* 135. The actual number of cases reviewed decreased each year (with the exception of 1984) from 533 in 1982 to 208 in 1988. *Id.* In 1982, the courts were able to dispose of approximately the same number of cases as those left pending. *Id.* In 1988, courts reviewed approximately a quarter of the number of cases left pending. *Id.* If, consistent with statistics for SAW applications already closed, 50,000 of the remaining applications are denied, appeals to the circuit courts of only one percent of those denials would flood the courts with twice the number of all cases that were decided over the seven year period of 1982-1988.

The inefficiencies inherent in this prospect are not mitigated by any benefit to the parties. To the contrary, the fail-

ure of SAW applicants to obtain relief on a case-by-case basis is in striking contrast to the success achieved in class actions. "The LAU remanded about ninety percent of the appeals it received in 1989, mostly because of court orders [in district court class actions] requiring the INS to correct deficiencies in adjudicating SAW applications." 2 C. Gordon & S. Mailman, *supra*, at 47-36 & n. 267 (citing *Haitian Refugee Center, Inc., v. Nelson*, 694 F. Supp. 864 (S.D. Fla. 1988), *aff'd*, 872 F.2d 1555 (11th Cir. 1989); *United Farmworkers of America (AFL-CIO) v. INS*, Civ. No. 5-87-1064-LCK/JFM (E.D. Cal. Apr. 3, 1989) (Settlement Agreement), *reported in* 66 Interpreter Releases 452, 467-68 (Apr. 24, 1989)). In contrast, the decisions of the LAU reveal that prior to the initiation of this suit not one individual determination was reversed on grounds of procedural irregularities. *See* Response to Petition for Certiorari at 11 n.5. Moreover, our review of circuit court opinions available on LEXIS does not reveal a single instance to date in which a SAW applicant obtained circuit court review of INS policies or procedures through an individual appeal under Section 1160(e).

The due process claims that the government would relegate under Section 1160(e) to case-by-case review are directly analogous claims asserted in *Califano v. Yamasaki*, 442 U.S. 682 (1979). There, this Court rejected government objections to certification of a class of plaintiffs challenging certain procedures under the Social Security Act as violative of due process. In *Yamasaki*, as in the present case,

> [t]he issues involved are common to the class as a whole. They turn on questions of law applicable in the same manner to each member of the class . . . . It is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue. And the class action device saves the resources of both the courts and the parties by permitting an issue potentially affecting many [applicants] to be litigated in an economical fashion . . . .

442 U.S. at 701.

As set forth in *Yamasaki*, this Court requires "a clear expression of Congressional intent" to "indicate that the usual Rule providing for class actions is not controlling, where under that Rule certification of a class action is otherwise permissible.". *Id.* at 700. The legislative history of IRCA reveals no such intent. To the contrary, in enacting the bill that codifies Section 1160(e), Congress rejected a version containing a judicial review provision that explicitly barred class actions.[7] "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1218-19 (1987). The legislative history reflects, moreover, that Congress sought to "ensure that fair administrative reviews are conducted by the INS and to provide for the complete consideration of all possible evidence to determine legalization" without "unduly burden[ing] to Government or the applicants with an excessively complex process," 130 Cong. Rec. 17229 (daily ed. June 20, 1984) (Remarks of Rep. Mineta). These concerns are consonant with the policies embodied in Rule 23 and embraced by this Court—and with the realities of how issues are raised and preserved in "pattern and practice" cases.

The most frequently recognized benefit of the class action is avoidance of duplicative suits and the concomitant increased court efficiency in the administration of litigation. The Rules Advisory Committee in commenting on the 1966

---

7 The bill in question, S. 1200, did not yet contain a SAW program. S. 1200 would have established a general legalization program under which there would be "no judicial review (by class action or otherwise) of a decision or determination under this section" and further provided that an alien denied adjustment of status under this legalization program "may not raise a claim concerning such adjustment in any proceedings of the United States or any State involving the status of such alien. . . ." S. 1200, 99th Cong., 2d Sess. § 202(f)(1985). H.R. 3810 did provide for a SAW program and as passed by the House contained what is now 8 U.S.C. § 1160(e). The Conference substitute adopted the House provision including the provisions with respect to judicial review. See H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess. 96 (1986).

amendments to Fed. R. Civ. P. 23 stresses the judicial economies and procedural convenience of class actions: "[the Rule] encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Fed. R. Civ. P. 23 advisory committee's note, 39 F.R.D. 69, 102-03 (1966).

This Court, as well, has recognized that class certification advances "the efficiency and economy of litigation which is a principal purpose of the procedure." *General Tel. Co. v. Falcon*, 457 U.S. 147, 159 (1982). *See also American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550 (1974) ("A federal class action is . . . a truly representative suit designed to avoid, rather than encourage, unnecessary filings of repetitious papers and motions.")

Class actions provide significant benefits to defendants as well as plaintiffs:

> The justifications that led to the development of the class action include the protection of the defendant from inconsistent obligations, [and] the provision of a convenient and economical means for dispensing of similar lawsuits . . . .

United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402-03 (1980); *see also Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980); Note, *Developments in the Law, Class Actions*, 89 Harv. L. Rev. 1318 (1976).

Commentators also recognize the particular utility of the class action procedure in civil rights litigation:

> Groups which find themselves unable to achieve their stated objectives through the ballot frequently turn to the Courts . . . . [They help make] possible the distinctive contribution of a minority group to the ideas and beliefs of our society [and provide an] avenue open to a minority to petition for the redress of grievances.

NAACP v. Button, 371 U.S. 415, 429-30 (1963). Judge Weinstein has observed that "[t]he impact of class actions in civil rights cases is substantial. Precedent alone never has the affect of a judgment naming a particular class of which a person is a member." Weinstein, *Some Reflections on the 'Abusiveness' of Class Actions*, 58 F.R.D. 299 (1973) (remarks before the Fifth Judicial Circuit Symposium on Class Actions).

Judge Weinstein's remarks are particularly apt in the context of the SAW program. We have not found a single individual SAW application that has reached the Court of Appeals, although all interviews under the program (other than re-interviews ordered as a result of the outcome of class actions filed in district courts) apparently have been completed. Assuming, for the sake of argument, that an individual applicant were able to obtain meaningful relief in the court of appeals by means of the review set forth in Section 1160(e), at this juncture a decision invalidating defective INS procedures would have no prospective effect. Each applicant affected by those procedures would be required to seek a separate order re-opening his or her application.

It is also significent that, as of May 16, 1990, only 3.3 percent of all SAW applicants were represented by counsel, while 75 percent proceeded *pro se*. The remaining 21.7 percent were not represented by legal counsel, *pro bono* or otherwise, but by temporary agencies created by voluntary groups called Qualified Designated Entities. Letter of Michael Hoefer, Chief of the Demographic Statistics Branch, Statistics Division of the INS, to Kristine Poplowski dated August 14, 1990 (Annexed hereto as Appendix A). Another benefit of the class action that is clearly relevant here is "effective utilization of finite sources of legal help." 1 H. Newberg, *Newberg on Class Actions*, § 5.13, at 451.

An interpretation of Section 1160(e) that divests district courts of jurisdiction to hear broad-based regulatory challenges thus unnecessarily burdens all concerned—plaintiffs, the government, the judiciary, and scarce *pro bono* counsel—

by withholding the clear benefits of class certification that is otherwise appropriate under Rule 23.

CONCLUSION

For the foregoing reasons, *amicus* American Bar Association urges that the decision of the Court of Appeals for the Eleventh Circuit be affirmed.

Respectfully submitted,

Of Counsel:

ROBERT E. JUCEAM, ESQ.
WILLIAM MCGUINNESS, ESQ.
SANDRA M. LIPSMAN, ESQ.
CRAIG H. BAAB, ESQ.
CAROL L. WOLCHOK, ESQ.

Counsel of Record:

JOHN J. CURTIN, JR. ESQ.
President, American Bar Association
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

Attorneys for Amicus Curiae

APPENDIX

A 1

[LETTERHEAD
U.S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE]

CO-979-C

August 14, 1990

Christine Poplowski
Farm Worker Justice Fund
2001 S St. NW
Suite 210
Washington, D.C. 20009

Dear Ms. Poplowski:

This is in response to your telephone conversation requesting the number of Special Agricultural Worker (SAW) applicants who used the services of a lawyer.

As of May 16, 1990, SAW applicants were represented by: self - 957,720 (75.0 percent); Lawyer only - 38,637 (3.0 percent); Qualified Designated Entity (QDE) only - 277,063 (21.7 percent); Lawyer and QDE - 3,324 (.3 percent). The total represented by lawyers is 41,961 or 3.3 percent.

If I can be of further assistance or if you have any questions please contact me at (202) 376-3066.

Sincerely,

/s/ MICHAEL D. HOEFER

Michael D. Hoefer, Chief
Demographic Statistics Branch
Statistics Division